SUPREME COURT. U.S.

No. 50218

Office-Supreme Court, U.S.
FILED
JUN 3 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

PUREX CORPORATION, LTD., and FIREMEN'S MUTUAL INSURANCE COMPANY,
Petitioners,

vs.

ST. LOUIS NATIONAL STOCKYARDS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

LON HOCKER,
411 North Seventh Street,
St. Louis, Missouri 63101,
MAin 1-6100,
Attorney for Petitioners.

HOCKER, GOODWIN & MacGREEVY,
St. Louis, Missouri,
JOSEPH R. OLSHAN,
Providence, R. I.,
Of Counsel.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

INDEX.

	Page
Prayer	1
Grounds for grant of the writ	1
Questions presented	2
Constitutional, statutory and rules provisions involved	3
Concise statement of the case	5
Argument	8
The importance of the questions	8
The transfer	9
The exclusion of the evidence	13
Appendix:	
Opinion of the United States Court of Appeals for the Seventh Circuit	19
Petition for rehearing and alternative motion to transfer appeal	25
Order denying petition for rehearing	30
Order denying motion to transfer	31

Cases Cited.

Cox v. Esso Shipping Company, 247 F. 2d 629, 632 (5th Cir. 1957)	15, 16
Frost v. Yankwich, 9 Cir., 1958, 254 F. 2d 633, 637	12
Nelson v. Union Wire Corp., 199 N. E. 2d 769, 31 Ill. 2d 69, Sup. Ct. Ill. 1964	16
North Branch Products, Inc. v. Fischer, 284 F. 2d 611, 109 U. S. App. D. C. 182, cert. den.	10
People ex rel. Nelson v. Central Mfg. District Bank, 28 N. E. 2d 154, 161, 300 Ill. App. 15, 30, 31	16
Preston Corporation v. Raese, 335 F. 2d 827	11

Schlagenhauf v. Holder, 85 S. Ct. 234, 379 U. S. 832, 11 L. Ed. 2d 63 12

U. S. A. v. Hester, 325 F. 2d 654, 657, 9 Cir., 1963 12

Statutes and Rules Cited.

28 U. S. C., 1254 (1) 2
28 U. S. C., 1294 (1) 2, 4, 11, 12
28 U. S. C., 1404 (a) 2, 4, 5, 8
28 U. S. C., 1861 10
28 U. S. C., 1865 (a) 10
28 U. S. C., 2106 ..... 2, 4, 11, 12
United States Constitution Amendments, Article V... 3
Federal Rules of Civil Procedure:
Rule 43 (a) 3, 4, 8, 16
Rule 45 9

IN THE

SUPREME COURT OF THE UNITED STATES.

PUREX CORPORATION, LTD., and FIREMEN'S MUTUAL INSURANCE COMPANY,
Petitioners,

vs.

ST. LOUIS NATIONAL STOCKYARDS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

Your petitioners pray that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit rendered February 8, 1967, pursuant to an opinion issued the same day and corrected on the court's own motion which is not yet reported in any publication. The judgment, the corrected opinion, petition for rehearing, the alternative motion to transfer, and the orders overruling the motions, are set out in the appendix to this petition.

GROUNDS FOR GRANT OF THE WRIT.

(i) The judgment of the Circuit Court of Appeals for the Seventh Circuit sought to be reviewed with its supporting opinion was entered February 8, 1967.

(ii) Petitioners' petition for rehearing and alternative motion to transfer the appeal were overruled respectively on April 11, 1967, and on April 13, 1967.

(iii) This court's jurisdiction to grant certiorari in this case arises from 28 U. S. C. 1254 (1).

Petitioners assert that the Court of Appeals has decided important questions of Federal Law which have not been but should be settled by this Court. These questions are set out immediately below in two related groups with the Court of Appeals' answers thereto (as gathered from the opinion and orders) appended in brackets.

QUESTIONS PRESENTED.

I.

(a) Is that Circuit Court of Appeals, to which an appeal must be taken under 28 U. S. C. 1294 (1), *without jurisdiction* (notwithstanding 28 U. S. C. 2106) to review alleged error in an order changing the venue for trial (under 28 U. S. C. 1404-a) from a District Court in one circuit to a District Court in another? [Court of Appeals: *Yes.*]

(b) If so, should the appellate court, on motion, transfer the appeal to another Circuit Court of Appeals having such jurisdiction, for the resolution of the asserted error? [Court of Appeals: *Denied.*]

(c) Are the cited statutes constitutional as against due process of law if they are correctly construed as preventing any review, in an appeal from an adverse judgment, of an erroneous transfer order sending the case to a court embraced within a different judicial circuit? [Court of Appeals: *Denied.*]

II.

(a) Has a plaintiff a remedy, where defendant procures the transfer of a jury trial just two and one-half miles, but across district and circuit boundaries, to a new venire drawn from and sitting in the immediate vicinity of defendant's place of business, by an affidavit that the testimony of *seventy-four* named and identified non-local persons *"will be material and necessary to the defense of the case"*; yet in the actual trial calls only *nine* of them? [Trial Court: *no.* Court of Appeals: *we agree.*]

(b) Specifically, in such a case is it error to exclude the affidavit from consideration by the jury as an admission, where defendant's trial position is:

> "We put on everybody who knew anything about the fire, everybody who was there, everybody who could contribute to the knowledge that you need to form a determination of whether or not the insurance company and Purex are entitled to a judgment against this Stockyards Company . . ."?
>
> [Court of Appeals: *No.*]

(c) Has a trial court *discretion*, under 43 (a) F. R. C. P., to exclude admissions of a party which would be admissible both under the prior Federal rule and under the law of the State where the court is sitting? [Court of Appeals: *Yes.*]

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED.

United States Constitution Amendments, Article V:

> "No person . . . shall . . . be deprived of life, liberty or property without due process of law . . ."

28 U. S. C. 1294:

"Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeal as follows:

"(1) From a District Court of the United States to the Court of Appeals for the circuit embracing the district . . ."

28 U. S. C. 2106:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

28 U. S. C. 1404-a:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Federal Rules of Civil Procedure:

"Rule 43. Evidence.

"(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the

United States court is held. In any case, the statute or rule which favors the receiption of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

CONCISE STATEMENT OF THE CASE.

Petitioners, Purex Corporation, Ltd., and Firemen's Mutual Insurance Company, brought this action against respondent in the United States District Court for the Eastern District of Missouri, sitting in St. Louis, Missouri (A. 1), on grounds of diversity of citizenship (A. 13, 14), for the recovery of $755,226.78, plus interest, on account of the loss of goods owned by Purex and stored under warehouse receipts, in respondent's warehouse, which burned with a nearly total loss of its contents, on May 11, 1964 (A. 13-15).

Respondent moved to transfer the cause to the Eastern District of Illinois, sitting in East St. Louis, Illinois, on the ground of convenience of witnesses and parties in the interest of justice under 28 U. S. C. 1404 (a) (A. 4-5), supported by an affidavit referred to below. The transfer was ordered (A. 13-15), and the case was prepared and tried in East St. Louis before Chief Judge Juergens. Respondent's plant is located in National City, Illinois, immediately contiguous to East St. Louis. Respondent owns about 70% of the land of National City (A. 85).

Evidence in chief for the petitioners consisted of proof of the warehousing and the issuance of the warehouse receipts (A. 39); proof of the nature and value of the goods destroyed (A. 44-48) and of respondent's report to Purex that the goods had been destroyed by fire (A. 39-40).

In support of its position that the cause of the fire was unknown, respondent called ten witnesses, of whom nine were identified in the motion to transfer, whose evidence consisted of showing the careful manner in which the warehouse was kept, as to repairs and housekeeping (A. 49-50), and of testimony to the effect that the warehouse was in perfect order at 2:15 P. M., when a "break time" was called (A. 66); that smoke was smelled five or ten minutes later (A. 67); that immediately thereafter fire or smoke, or both, was so thick as to prevent access to the warehouse (A. 67-68), and that the whole roof fell in a half hour later (A. 61); that some investigation had been made, and that the cause of this rapidly spreading fire was unknown (A. 50, 61, 77).

In rebuttal, petitioners offered in evidence the motion and affidavit for the transfer in which respondent had represented that there were *seventy-four* witnesses having relevant knowledge of the fire whose testimony "will be material and necessary to the defense of the case," and that in its answer respondent had alleged that the fire had been caused "by an act of God," both as admissions (A. 85-89). Both offers were refused (A. 87-90).

Respondent argued to the jury (A. 102):

> "He criticizes the kind of witnesses that we have had and the proof we have put on. We put on everybody who knew anything about this fire, everybody who was there, *everybody who could contribute to the knowledge that you need to form a determination of whether or not the insurance company and Purex are entitled to a judgment against this Stockyards Company.*"

The verdict was for defendants; plaintiffs appealed, alleging error (among others) (1) in the transfer of the case, (2) in the exclusion from evidence of the motion to

transfer and affidavit, and (3) in the exclusion from evidence of the Act of God allegation in the answer (Br. 7, 8, 9).

As to error (1), the Court of Appeals held (infra 21): "We do not have that jurisdiction."

As to error (2), the Court of Appeals held (infra 23): "Defendants' explanation presented a question of fact as to why defendant did not produce at the trial all of the witnesses referred to in the affidavit, but was willing to rely on a lesser number. The jury obviously accepted defendants' position as correct."*

As to error (3), the Court of Appeals held (infra 21):

> "We hold that the court did not abuse its discretion in refusing to permit plaintiff's attorney to read the above-quoted language to the jury."

The opinion of the Court of Appeals also held (infra 21):

> "It appears to us that the Court of Appeals of the Eighth Circuit has ample jurisdiction, whether by mandamus or other remedy, if not by appeal, to adjudicate the validity of the transfer order."

Accordingly, petitioners, in addition to a motion for a rehearing (infra 26) moved for a transfer of the appeal for the determination of the validity of the transfer order to the Court of Appeals for the Eighth Circuit (infra 28).

Both motions were denied (infra 30, 31).

---

* The explanation was made to the Court of Appeals, not to the jury. The jury never got to see the motion or affidavit, because of the error complained of.

ARGUMENT.

The Importance of the Questions.

The opinion below is, so far as we have found, the first federal decision holding non-reviewable, in a normal appeal from an adverse judgment, an erroneous order of transfer under 28 U. S. C. 1404-a.

It is likewise the first federal decision holding unavailable any remedy for the procurement of a transfer order by a representation to the Court of original venue which, at trial, proves to be false. Specifically, it holds that there is not available the remedy of introducing into evidence the false-proving motion and affidavit so that the jury might consider, in the light of its affidavit that it would need to call sixty-five other witnesses, the defendant's protestation that its ten witnesses constituted full disclosure.

And it is the first federal decision to construe the words of Rule 43, F. R. C. P.: "All evidence *shall be admitted* . . ." etc., as giving the trial court *discretion* to exclude evidence clearly admissible by the terms of the rule.

The great importance of these holdings is manifest from the frequency of transfers under § 1404-a, and the open opportunity for fraud in such transfers, if there be no remedy for the false procurement thereof. Under the rule of law laid down by the Court of Appeals, many a contest over a change of venue can become a lying-match. Not even the court's contempt or disbarment power would prevent it; for a defendant could (as this one did) hire one lawyer to make the affidavit for change of venue and another to try the case; and both could honestly say they acted in good faith.

Lastly, the importance of the interpretation of the heretofore absolute rule of 43 F. R. C. P. as being a rule of

discretionary application can hardly be exaggerated. It affects *every* trial in the federal courts where evidence is offered. If the rule is to be changed to make the admission of otherwise admissible testimony *discretionary* with the trial judge, it should be done by a change in the rule itself under normal procedure, and not by an *ad hoc* statement in private litigation.

The Transfer.

The transfer ordered in this case was from the Court House in St. Louis, Missouri, to the Court House in East St. Louis, Illinois, a distance of 2¼ miles as the crow flies and of 2½ miles as the streets and bridges run! (Maps U. S. Geo. Sur. Granite City and Cahokia quadrangles.) There are four vehicular bridges in the down-town St. Louis area; and defendant's plant in National City, Illinois, which is immediately contiguous to East St. Louis on the North (A. 9), is only two or three minutes' driving time from the bridge (A. 59).

The only substantial ground given for the transfer (A. 5, 6), and the only ground supported by evidence (Affidavit, A. 7-12) was the assertion (A. 5, par. 9):

> "All of the witnesses, whose testimony will be material and necessary to the defense of this case, reside or work in the vicinity of East St. Louis, Illinois . . . . The names and addresses as set forth in the attached affidavit."

All of the 74 witnesses identified in the affidavit (A. 9 et seq.) by name, address, and occupation, were given addresses within a small fraction of the 100 miles from the St. Louis, Missouri, Court House permitted for out-of-district subpoenas by Rule 45, F. R. C. P.

Because the affidavit dealt with defendant's intention as to its defense of the claim, no contradictory counter-affidavit was possible.

But petitioners contend that no convenience of parties or witnesses could be served by such a transfer, and that it could not be in the interest of justice, *even if we take at face value the representation that defendant would call 74 nearby Illinois witnesses.*

In a speech to the American College of Trial Lawyers April 10, 1967, Judge Irving R. Kaufman, Chairman of the Committee on the Operation of the Jury System of the Judicial Conference of the United States, opened his remarks with the following words:

> "As many of you know from personal experience, it takes a trial lawyer very little time to realize that the law is far more than a set of syllogisms. Especially for a litigator, the law is given meaning by ordinary mortals; and *who* gets to decide a given question will very often determine what the answer will be." (Emphasis Judge Kaufman's.)

While subpoenas will run a hundred miles across state and district lines, summons for jury venires do not (28 U. S. C. 1861), and practice is, under authorization of 28 U. S. C. 1865 (a), to select jurors from near the place of trial.

The effect of the transfer was only to deprive petitioners of the right to select the place to file their action, vouchsafed to them by such cases as North Branch Products, Inc. v. Fischer, 284 F. 2d 611, 109 U. S. App. D. C. 182, cert. den., and thus to have jurors drawn from the district of the forum chosen by them. The transfer substituted jurors drawn from, and sitting, next door (so to speak) to defendant's place of business.

In the Court of Appeals petitioners cited authorities denying transfers based upon sixty mile, one hundred mile, one hundred and five miles and ninety-five mile differences (Br. 11, 12), which seem to be the smallest previously reported; and urged the rule that plaintiff's choice

of forum should rarely be disturbed, citing authorities (Br. 15).

Sua sponte (this not having been suggested by either side), the Court of Appeals held it could not pass on the alleged error (infra 21):

"We do not have that jurisdiction."

The only authority cited by the court was Preston Corporation v. Raese, 335 F. 2d 827. But *Preston* was an attempted appeal *from a transfer order*, not from a judgment. The Fourth Circuit held, correctly, that the transfer order was not an appealable order, but then said in a dictum, that if it were appealable, it would have to be appealed to the Fifth Circuit, wherein the order appealed from was made. The dictum, it seems, would be true or not depending on the assumed wording of an hypothetical statute making such an order appealable. But since this is not an attempt to appeal a transfer order, neither the holding nor the dictum appears to have any bearing on the case at bar.

This case is an appeal from an adverse judgment, not from a transfer order. The appeal was taken to the only appellate court to which it could have been taken, under 28 U. S. C. 1294 (1): the Seventh Circuit.

That court has virtually plenary power to correct error in such an appeal; for the scope of its power on appeal is no less broad than that of the Supreme Court itself. 28 U. S. C. 2106.

We think the Court of Appeals must have confused the question: What is an appealable order? with the question: What errors may be considered on appeal? These are not the same question. An order respecting the admission of evidence, for example, is not appealable, but it is reviewable on appeal.

The Court of Appeals suggests (infra 21) that the Eighth Circuit has jurisdiction to review the order "by mandamus or other remedy, if not by appeal".

What the "other remedy" referred to is, is not clear, but mandamus is neither a writ of right, like an appeal, nor a substitute for an appeal.

> "A writ of mandamus directing a court to do some act is an extraordinary remedy, and is properly issued only when the lower court clearly acts in excess of its jurisdiction, abuses its jurisdiction, or refuses to exercise it."
>
> Frost v. Yankwich, 9 Cir., 1958, 254 F. 2d 633, 637;
> U. S. v. Hester, 325 F. 2d 654, 657, 9 Cir., 1963;
> See also Schlagenhauf v. Holder, 85 S. Ct. 234, 379 U. S. 104, 13 L. Ed. 2d 152.

Petitioners contended that the transfer order was error; not that it was in excess of jurisdiction.

By the appeal, petitioners had, in conformity with 28 U. S. C. 1294, duly prosecuted this appeal to the Court of Appeals for the Seventh Circuit, and had "lawfully brought before it for review" the judgment of the trial court, by which they were aggrieved. If the *judgment* was tainted by any erroneous order (as by the ordering of the wrong venue), the Court had jurisdiction, under 28 U. S. C. 2106 by which it

> ". . . may remand the cause, and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

Petitioners suggested (Br. 16) that an appropriate order for further proceedings would be:

> ". . . if the case is not to be remanded to the Eastern District of Missouri as requested under Point

> I, it should be remanded to the trial court for a new trial, with directions that the file be returned to the Missouri District Court for a redetermination, in the light of the actual conduct of the defendant at the trial, of whether the cause should be transferred."

Such an order would be no different in concept from that made by the Fourth Circuit on May 5, 1967 in Progner v. Eagle, 35 LW 2690.

But the Court never reached the question, saying:

> "We do not have that jurisdiction" (infra 21).

Since the Seventh Circuit held that the Eighth Circuit did have "ample jurisdiction", petitioners requested a transfer of the appeal to that Court. Denied.

By denying petitioners' motion to transfer the appeal to the Eighth Circuit, the Court of Appeals deprived petitioners of the right to have their claim of error heard by *any* court.

Due process of law is essentially an opportunity to be heard. Where may petitioners be heard?

This Court should grant petitioners its writ of certiorari to permit a review of their claim of error in the transfer of the trial out of the jurisdiction of their selection.

The Exclusion of the Evidence.

When, upon completion of defendant's evidence, respondent had taken the position that the cause of the fire was unknown, and had called only nine of the seventy-four witnesses named in the affidavit plus one not named in the affidavit (Guffey, A. 70), respondents offered the motion and affidavit in evidence as an admission. The trial court sustained respondent's objection to it, saying (A. 87, 88):

> "If there is a false affidavit or if there is an affidavit fallaciously filed, which is not correct, sup-

porting the change of venue or the necessary attachments thereto, is a matter which neither this Court nor the Court in the Eastern District of Missouri could not have this jury determine or consider, and the motion [objection?] will still be sustained."

The Court of Appeals held (infra 22):

"We agree with the trial court which ruled with the defendant in this matter."

Thus, although there were sixty-five absent witnesses whose testimony respondent's first attorney had sworn was "material and necessary to the defense of the case", respondents' second attorney was able to argue to the jury (A. 102):

"He criticises the kind of witnesses that we have had and the proof that we have put on. We put on everybody who knew anything about this fire, everybody who was there, everybody who could contribute to the knowledge that you need to form a determination of whether or not the insurance company and Purex are entitled to a judgment against the Stockyards Company."

We have therefore a situation where defendant not only successfully represented to the Court where the suit was filed that the case should be removed to Illinois to permit it more easily to call 74 necessary Illinois witnesses, and successfully also represented to the jury in the Court to which the case was removed that the ten witnesses it called were all that were necessary. But in addition we have a situation where neither the judge to whom the first representation was made, nor the jury to which the second was made, was permitted to know about the conflicting representation.

So far as we have found, no prior case has posed the question of what remedy exists in case of such duplicity.

It is a little hard to conceive of an adequate remedy, because of the necessary lateness at which the removed party must discover the falsity of the original representation.

But at the least,—but at the very, very least, justice should require that the jury, which was asked to believe the second representation, be permitted to judge of its accuracy in the light of the prior contrary representation. This the Court denied. The motion and affidavit were excluded from evidence. The grounds stated were (A. 87):

> "Mr. Shepherd: I object to that on two grounds. First, the pleadings are directed to the Court and not a material issue involved in what we are trying here. Secondly, it does not constitute proper rebuttal evidence.
>
> "The Court: Sustained."

What is an admission?

In Cox v. Esso Shipping Company, 247 F. 2d 629, 632 (5th Cir. 1957), it was held:

> "For an admission, rightly understood but so often confused, in its classic prototype is merely—but significantly—a position taken by the adversary, either personally or through an authorized agent, which is contrary to and inconsistent with the contention now being made in the litigation. It is that simple. It need not have been, as is so often said, an admission against interest, nor is there a need to lay a predicate for its use. All that is needed is an authoritative statement by the adversary inconsistent with the contemporary litigation position."

There was no real argument either below, on appeal, or in the opinion, as to why this motion and affidavit were not admissible as an admission both under Federal law

(Cox case, supra) and under Illinois law. Nelson v. Union Wire Corp., 199 N. E. 2d 769, 31 Ill. 2d 69, Sup. Ct. Ill. 1964, and People ex rel. Nelson v. Central Mfg. District Bank, 28 N. E. 2d 154, 161, 300 Ill. App. 15, 30, 31, both quoted at Brief 20.

Rule 43, F. R. C. P., provides:

> "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. In any case, the statute or rule which favors the reception of the evidence governs . . ."

Since the evidence offered would have been admissible under either the state or the federal rule, on what basis could it be held not error to exclude it?

Since the Court advanced no reason for its ruling other than a discussion of the weight of this evidence, we can only speculate as to the reason from the portion of the opinion upholding the exclusion of another offered admission.

Petitioners offered an allegation from the answer on which defendant was trying the case, that the fire was caused by an *Act of God,* rather than, as defendant told the jury, by an unknown cause.

Rule 43 applied as well in that instance; the allegation was similarly shown to be admissible under both state and federal law (Br. 25, 26); but the Court upheld the exclusion saying only (Op. 3):

> "We hold that the court did not abuse its discretion in refusing to permit plaintiffs' attorney to read the above-quoted language to the jury."

As in its reply brief (pp. 5, 6), petitioners stated in their Motion for Rehearing, etc. (Br. 3),

> ". . . the court overlooked the requirements of Rule 32, F. R. C. P., that such evidence 'shall be admitted', which allows no discretion to refuse the same."

It must be that the refusal of both offers was predicated on the assumption that it was discretionary with the trial judge whether or not to admit such evidence.

This is a misconception of the rule, which can do vast damage to the orderly trial of lawsuits. Hereafter, where this opinion is authoritative, no litigant can know whether particular evidence, although admissible, will be received until the trial judge has, on who knows what criteria, given his decision on how his discretion shall be exercised.

The precedent of this interpretation of the rule is so dangerous, and the exclusion of this evidence was such an injustice, that this court should grant its writ of certiorari, to protect the rule and correct the injustice.

Respectfully submitted,

LON HOCKER,
Attorney for Petitioners.

HOCKER, GOODWIN & MacGREEVY,
St. Louis, Missouri,
JOSEPH R. OLSHAN,
Providence, R. I.,
Of Counsel.

The United States Court of Appeals
For the Seventh Circuit,
Chicago, Illinois 60604.

Wednesday, February 8, 1967.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed, with costs, in accordance with the opinion of this Court filed this day.

No. 15845 September Term, 1966 January Session, 1967.

February 8, 1967.

Before Schnackenberg, Knoch and Kiley, *Circuit Judges.*

Schnackenberg, *Circuit Judge.* Purex Corporation, Ltd., a California corporation, and Firemen's Mutual Insurance Company, a Rhode Island corporation, plaintiffs, have appealed from a judgment of the United States District Court for the Eastern District of Illinois, entered in favor of St. Louis National Stockyards Company, a Delaware corporation, defendant, based upon a verdict of a jury.

It appears from the record that this proceeding was started by the filing of a complaint in the federal District Court for the Eastern Division of Eastern Judicial District of Missouri, on June 9, 1964, and that on July 2, 1964, defendant moved said court, pursuant to 28 U. S. C. A., § 1404 (a), to transfer the action to the federal district court at East St. Louis, Illinois, for the convenience of

the parties and the witnesses and in the interest of justice, which motion was supported by an affidavit; that the federal court in Missouri by its order of September 8, 1964, directed the transfer as requested. All subsequent proceedings were held in the federal court at East St. Louis, Illinois.

This action was brought to recover from defendant damages for its alleged failure to deliver goods manufactured by Purex and stored in a warehouse of defendant, which were destroyed by fire.

1. Plaintiffs now argue that they "were erroneously deprived of the valuable right to which they were entitled under the law, of choosing their own venue, and since the probability is that they were prejudiced as a result of being so deprived, a new trial should be granted, and the cause remanded to the District in which it was filed for retrial."

They add: "In view of the most unusual and probably unique transfer in this case to a Court House 2½ miles distant, in the teeth of the general rule that a plaintiff's choice of forum should be given great weight, how did it happen that the transfer was made?"

Plaintiffs' attack is directed at the action of the district court in St. Louis, which ordered the transfer. However, if that court erred when it entered the transfer order, plaintiffs' remedy was a resort to the Court of Appeals for the Eighth Circuit. We have no jurisdiction to grant relief in this proceeding in respect to plaintiffs' insistence that a federal district court in the eighth circuit "on an insufficient showing [had] erroneously deprived [them] of their right to select their own venue, in derogation of, and not in vindication of, the interests of justice."

Inasmuch as the complaint of plaintiffs is actually directed against the action of the transferor court which sits

in the eighth judicial circuit, and as the record fails to show that plaintiffs made, in the transferee court in Illinois, any motion to retransfer the case to St. Louis, we have no jurisdiction to act extra-territorially in order to adjudicate the question now raised by plaintiff.

As was said by the court in *Preston Corporation v. Raese,* 4 Cir., 335 F. 2d 827 (1964), at 828:

> "The rule is well established that a transfer order is not appealable. Jiffy Lubricator Co. v. Stewart-Warner Corp., 177 F. 2d 360 (4th Cir. 1949), cert. denied, 338 U. S. 947, 70 S. Ct. 484, 94 L. Ed. 584 (1950). *But even if* such an order were appealable the appropriate appellate court would be the Fifth, not the Fourth, Circuit. *The attempt here is to appeal to us from an order entered by a District Court not within our territorial jurisdiction.* We know of no authority permitting us to entertain such an appeal." (Italics supplied.)

It appears to us that the Court of Appeals of the Eighth Circuit has ample jurisdiction, whether by mandamus or other remedy, if not by appeal, to adjudicate the validity of the transfer order. We do not have that jurisdiction.

2. Claiming that defendant had never abandoned paragraph 10 of its answer, reading: "Further answering, this defendant states that the fire mentioned in plaintiffs' second amended complaint was an Act of God . . .", plaintiffs emphasize that this fire was not an act of God.

We hold that the court did not abuse its discretion in refusing to permit plaintiffs' attorney to read the above-quoted language to the jury.

3. The court indicated that the jury was not to be informed of the amount of insurance carried by plaintiff

Purex, and that, if a judgment were entered upon a verdict, any dispute between Purex and the insurance company plaintiff would be settled by the court.

Plaintiffs now contend that defendant's attorney improperly stated before the jury that evidence would show that Purex was covered by insurance and had thereby collected $400,000. However, it appears that the court told the jury that any statement of counsel regarding payment of money by any insurance company was to be disregarded.

4. In connection with Plaintiffs' Exhibit 20, a part of which is an affidavit filed by defendant in support of its motion to transfer (ante 2), plaintiffs argue that, whereas, in securing the order for change of venue, defendant represented to the court at St. Louis that 74 persons (whose names and addresses were stated), were witnesses necessary to the defense of the case, at the trial defendant had produced only about 10 witnesses and told the jury that "we put on everybody who knew anything about this fire * * *". From these circumstances it is argued by plaintiffs that one of the representations was wrong. Plaintiffs say that this is an admission and that the exclusion of the affidavit was prejudicial error.

Defendant, however, points out that, while the affidavit, listing witnesses and presented with the motion to transfer, contained allegations in regard to the number of witnesses to be called at the trial, it is obvious that, because there were groups of electricians, firemen, and others mentioned, it would actually be necessary to call only a representative number from the entire list and for that reason the contention of plaintiffs that defendants had made an admission which was relevant in this case is not tenable. We agree with the trial court which ruled with the defendant in this matter.

Obviously plaintiffs sought to submit to the jury as a question of fact what they characterize as an admission. Defendant's explanation presented a question of fact as to why defendant did not produce at the trial all of the witnesses referred to in the affidavit, but was willing to rely upon a lesser number. The jury obviously accepted defendant's position as correct. We find no error here.

5. Plaintiffs in Point IV of their brief state:

> "A review of the transcript will demonstrate that the defendant sought to try the case to the jury on the implication that Purex was adequately insured, and had been paid the amount of the coverage, and, consequently, that plaintiffs were not entitled to recover."

From our perusal of the record before us in this case we find nothing to support the foregoing statement. We reject it completely.

For the reasons hereinbefore set forth, the judgment from which this appeal was taken is affirmed.

Judgment Affirmed.

No. 15845

Kiley, *Circuit Judge, concurring.*

I concur. However, I think it is necessary to make brief additions to the court's opinion:

In section "2" of the opinion I would set out the complete paragraph 10 of defendant's answer:

> 10. Further answering, this defendant states that the fire mentioned in plaintiffs' second amended complaint was an Act of God and caused by no negligence

on the part of this defendant, and further this defendant calls upon plaintiff for strict proof of any negligence on the part of this defendant, and for strict proof of breach of any duty owed by this defendant to plaintiffs herein.

and add to the first paragraph in that section the following:

And there is no testimony justifying an inference of negligence on defendant's part.

In section "3" of the opinion I would add:

The plaintiffs' attorney told the jury that the Firemen's Mutual Insurance Company was a party plaintiff, and told the court he was willing to have the jury know that "Firemen's Mutual has subrogated part of the loss". The plaintiffs' contention is only that they were prejudiced by the defendant's attorney telling the jury the amount of insurance that Purex had collected. As stated herein, the court promptly told the jury to disregard "any payment of money by any insurance company".

A true Copy:

Teste:

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

In the
United States Court of Appeals
For the Seventh Circuit.

No. 15845.

Purex Corporation, Ltd., and Firemen's
Mutual Insurance Company,
Plaintiffs-Appellants,
vs.
St. Louis National Stockyards Company,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Illinois,
Honorable William G. Juergens, Judge Presiding.

PETITION FOR REHEARING AND ALTERNATIVE MOTION TO TRANSFER APPEAL.

INDEX.

	Page
Alternative motion to transfer appeal	4
Petition for rehearing	1

Statutes Cited.

28 U. S. C. 1291	2, 4
28 U. S. C. 1294 (1)	2, 4
28 U. S. C. 2106	2

PETITION FOR REHEARING.

Come now plaintiffs-appellants and move the court to order a rehearing in the above appeal, and for grounds of their motion plaintiffs-appellants state, respecting the court's opinion and order of February 8, 1967,

1. In holding that it had no jurisdiction to review the propriety of the order transferring this claim for trial from the district where it was filed, two and one-half miles to the immediate vicinity of appellee's business, the court overlooked that this appeal was taken, not from the order to transfer (which, as this court pointed out, was not an appealable order), but from the final decision

in favor of respondent (A. 19) and that from this decision no appeal was possible to any other court than this, under 28 U. S. C. 1294 (1), and that in considering the validity of the final decision below, any error which brought about the decision (no matter where made), under 28 U. S. C. 2106, is ground for reversal of the final decision, over which it has appellate jurisdiction under 28 U. S. C. 1291; and that under 28 U. S. C. 2106 it has full power to "require such further proceedings to be had" (such as a new trial in the original district) "as may be just under the circumstances".

2. In upholding the exclusion from evidence of appellee's motion to transfer, and supporting affidavit, naming seventy-four persons *"whose testimony will be material and necessary to the defense of this case"*, offered as an admission contrary to appellee's trial position that the ten witnesses it actually called (including one Missouri resident) were:

> "everybody who knew anything about the fire, everybody who was there, everybody who could contribute to the knowledge that you need to form a determination of whether or not this insurance company and Purex are entitled to a judgment against the Stockyards Company" (A. 102),

this court held (Op. 4):

> "Obviously plaintiffs sought to submit to the jury as a question of fact what they characterize as an admission. Defendant's explanation presented a question of fact as to why defendant did not produce at the trial all of the witnesses referred to in the affidavit, but was willing to rely on a lesser number. The jury obviously accepted defendant's position as correct. We find no error here."

In so holding the court overlooked the fact that the jury could not have accepted defendant's position as

correct, since (a) it never was permitted to hear or read the motion and affidavit in which defendant had taken its contrary position, thus to judge whether the sixty-four persons named as necessary and identified as to occupation and information but not called, could contribute to the jury's knowledge, and since (b) because the evidence was excluded, the explanation of why defendant did not call these sixty-four witnesses was not made to the jury (A. 102), but for the first time on this appeal (Br. for Defendants, 9, 10).

3. In holding that the trial court did not abuse its discretion in excluding from evidence the appellee's admission (contrary to its position at trial that the cause of the fire was unknown), that the fire was caused by

an Act of God, the court overlooked the requirements of Rule 43, F. R. C. P., that such evidence "shall be admitted", which allows no discretion to refuse the same (App. Reply Br. 5, 6).

4. Doubtless because the court mistakenly concluded that the remark "Mr. Hocker knows as well as anybody what was in there. A full list of . . ." was attributed to the trial court, rather than to defendant's counsel (Op. 5, cf. A. 98, Pl. Br. 41, 42, 43), this court failed to pass upon the error alleged, which was that this remark of counsel was a gross impropriety and deeply prejudicial, and that the court erred in not sustaining plaintiffs' objection thereto and their motion to reprimand counsel (A. 98, App. Br. 42, 43).

LON HOCKER,
Attorney for Plaintiffs-Appellants.

HOCKER, GOODWIN & MacGREEVY,
411 North Seventh Street,
St. Louis, Missouri 63101,
Of Counsel.

— 4 —

ALTERNATIVE MOTION TO TRANSFER APPEAL.

In the event their petition for a rehearing in the above appeal be denied, then come plaintiffs-appellants and show the court that:

1. One of the errors which, in their appeal, they allege brought about the adverse final decision below from which they have appealed, was the transfer of the claim, on motion of defendant-appellee, from a district in which they had filed the claim, two and one-half miles to the court of a district designated by defendant-appellee; and

2. In its opinion of February 8, 1967, this court held, despite the provisions of 28 U. S. C. 1294, limiting the court to which this final decision could be appealed to the Court of Appeals of the Seventh Circuit, that it had no jurisdiction to determine whether the transfer constituted error prejudicial to plaintiffs-appellants and held that the transfer order when entered was not appealable, and held that the Court of Appeals of the Eighth Circuit has ample jurisdiction to determine the same; and

3. Under 28 U. S. C. 1291, and the due process of law clause of Amendment V of Constitution of U. S. plaintiffs-appellants have the right to have the question of the alleged error, and its effect upon the final decision appealed from, reviewed in one of the Courts of Appeal, before the final decision below be affirmed; and, therefore,

Plaintiffs-appellants move the court to transfer this appeal to the United States Court of Appeals for the Eighth Circuit, for determination of the aforesaid alleged error and of its effect upon the final decision appealed from.

LON HOCKER,
Attorney for Plaintiffs-Appellants.

HOCKER, GOODWIN & MacGREEVY,
411 North Seventh Street,
St. Louis, Missouri 63101,
Of Counsel.

State of Missouri, }
City of St. Louis. } ss.

Lon Hocker, being duly sworn upon his oath states that he prepared the foregoing motions and that the facts stated therein are true, according to his best knowledge

and belief and certifies that the motions are presented in good faith and not for delay.

Lon Hocker.

Subscribed and sworn to before me this 21st day of February, 1967.

My commission expires 4-17-68.

Helen E. Moeser,
Notary Public.

Commissioned within and for the County of St. Louis, Missouri, which adjoins the City of St. Louis, Missouri, where this act was performed.

(Notary Seal)

United States Court of Appeals
For the Seventh Circuit,
Chicago, Illinois 60604.

Tuesday, April 11, 1967.

Before
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

Purex Corporation, Ltd., and Firemen's Mutual Insurance Company, Plaintiffs-Appellants, vs. St. Louis National Stockyards Company, Defendant-Appellee. No. 15845.	Appeal from the United States District Court for the Eastern District of Illinois.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby Denied.

United States Court of Appeals
For the Seventh Circuit,
Chicago, Illinois 60604.

Thursday, April 13, 1967.

Before
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

Purex Corporation, Ltd., and Firemen's Mutual Insurance Company,
Plaintiffs-Appellants,
No. 15845. vs.
St. Louis National Stockyards Company,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois.

It Is Ordered by the Court that the alternative motion of plaintiffs-appellants to transfer appeal be, and the same is hereby denied.